A

RE CHUA LIANG HONG; EX P: KUALA EXCEL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE J
[BANKRUPTCY NO: WA-29NCC-1388-04-2019]
15 MAY 2020

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BANKRUPTCY: *Notice – Setting aside – Error in amount stated in bankruptcy notice – Whether there was non-compliance with r. 90(1)(b) of Insolvency Rules 2017 – Whether judgment debtor suffered prejudice – Whether error could be cured by amendment without judgment debtor suffering any injustice – Whether bankruptcy notice should not be invalidated without benefit of curative provision under s. 93(3) of Insolvency Act 1967 – Insolvency Rules 2017, rr. 90(1)(b), 282 – Insolvency Act 1967, s. 3(2)(ii)*

C

BANKRUPTCY: *Notice – Amendment – Seeking to amend amount claimed in bankruptcy notice – Error in amount stated in bankruptcy notice – Whether amendment ought to be allowed – Whether judgment debtor prejudiced by amendment – Insolvency Act 1967, s. 93(3)*

D

Enclosures 25 and 41 were two separate appeals brought by the judgment debtor ('JD') against the decisions of the Senior Assistant Registrar ('SAR'). As both appeals were interrelated and the parties and counsel were the same, they were heard together. Enclosure 25 was the JD's appeal against the decision of the SAR dismissing the JD's application by way of summons in chambers ('encl. 5'), which was an application filed by the JD to set aside a bankruptcy notice ('BN') The JD applied to set aside the BN on the ground of non-compliance with r. 90(1)(b) of the Insolvency Rules 2017 ('Insolvency Rules') and that the amount of interest stated, was undisputedly overstated and in error. It was however contended by the judgment creditor ('JC') that the JD did not suffer any prejudice by reason of the breach of r. 90(1)(b) of the Insolvency Rules, which could and was, in any event, remedied. The JC maintained that even if the amount of interest was in error, it did not *per se* or necessarily render the BN invalid citing s. 3(2)(ii) of the Insolvency Act 1967 ('Insolvency Act'). The JC further argued that no notice was given by the JD pursuant to s. 3(2)(ii) of the Insolvency Act within the time allowed for payment *ie*, seven days, to dispute the validity of the bankruptcy notice on the ground that the amount stated exceeded the amount due. Enclosure 41 was the JD's appeal against the decision of the SAR allowing the JC's application by way of its summons in chambers ('encl. 23') which was an application filed by the JC to amend the bankruptcy notice. By its application in encl. 23, the JC sought to amend the amount of its claim in the BN from RM3,411,931.49 to RM3,411,246.56. It was not disputed that the amount stated in the BN was in error in that the amount due was overstated and in excess of RM684.93. The JD's contention was that the BN was not valid in the first place, because of the reasons raised by the JD in his application in encl. 5.

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Held (dismissing appeals):

(1) Although r. 90(1)(b) of the Insolvency Rules appears to be couched in mandatory terms, there also exists s. 131 of the Insolvency Act which makes it clear that any formal defect or irregularity would not invalidate any proceeding in bankruptcy unless otherwise ordered by the court. The process of issuing the BN was part of the 'proceeding' in bankruptcy. Therefore, under r. 282 of the Insolvency Rules, even if there had been a breach of r. 90(1)(b), the court would have the power under r. 282 to deal with it 'in such manner and upon such terms as the court may think fit.' Rule 90(1)(b) was not a requirement for the benefit of the JD but rather a requirement for the purposes of the court in connection with the issue of the BN. Therefore, the non-compliance with r. 90(1)(b) could not be said to be prejudicial to the JD, to have misled him or to have caused any injustice. As for the amount of interest wrongly stated in the BN, it would seem that it was held to be curable and was thus not struck out. (paras 32-35, 37 & 39)

(2) Section 3(2)(ii) of the Insolvency Act does not state that the BN 'shall not be invalid'. If it states that a BN 'shall not be invalid', it would imply that it shall be invalid if the required notice is given. The proviso in s. 3(2)(ii) of the Insolvency Act would be read as providing that a bankruptcy notice is not to be rendered invalid merely because the amount stated exceeded the amount due, unless by notice given within the time permitted, the JD disputed its validity. However, when such notice is given by the JD within the time limited, the question will then arise as to whether the bankruptcy notice should be invalidated or rendered invalid. Therefore, even if notice of an objection was properly given, whether a BN was to be 'invalidated' (rendered invalid) or allowed to be cured by amendment pursuant to s. 93(3) of the Insolvency Act, remained a matter of discretion for the court. In the exercise of the court's discretion, all relevant factors and the circumstances appertaining should be taken into account. (paras 49-53)

(3) The error in the BN was a calculation error and the amount in error was minor; an overstated amount of only RM684.93. Even if the amount in error was taken into account, the remaining amount due was still well over the statutory minimum of RM50,000 required under s. 5(1)(a) of the Insolvency Act for bankruptcy proceedings to be brought. This was an error that the JD himself was aware of. It therefore could not be said that he was misled. It was also an error that the JD could not have been misled by, as the amount concerned was interest that was calculated over a fixed period. In addition, there was no evidence that there was any attempt on the part of the JD to make payment. Further, the creditor's petition had not been heard. The error was such that may be

cured by an amendment without any prejudice to, or injustice suffered by, the JD. In the circumstances of the case, the BN should not be invalidated without the benefit of the curative provision under s. 93(3) of the Insolvency Act. (paras 54-57)

(4) Pursuant to the JC's application in encl. 23, the amendment to the BN sought was granted. In light of s. 93(3) of the Insolvency Act, there was no reason why the amendment sought could not, or should not, be allowed having regard to the reasons given. The amount in error was quite small, relative to the total amount due. Besides, it could not in truth be said that the JD had been prejudiced by the amendment which, in effect, reduced the sum payable by him. (paras 59, 61 & 62)

Case(s) referred to:

AmBank (M) Bhd & Ors v. Lim Sue Beng [2019] 7 CLJ 289 FC ***(refd)***
Ghazali Hj Ibrahim v. CIMB Bank Bhd [2012] 9 MLJ 768
In Re: Azizul Nizam Bidin; Ex p Solsis (M) Sdn Bhd [2017] 1 LNS 581 HC ***(refd)***
Mat Ripen Mat Elah v. Perwira Affin Bank Bhd [2005] 1 LNS 82 HC ***(refd)***
Per: Summugam Ramasamy lwn. Ex p Kwang Keh Chong [2018] 1 LNS 2206 HC ***(refd)***
Re Mohd Zuhri Mohd Idris; Ex p Bumiputra-Commerce Bank Bhd [2010] 1 CLJ 786 HC ***(refd)***
Re Stephen Wong Leong Kiong; Ex p HSBC Bank Malaysia Bhd [2005] 5 CLJ 504 HC ***(refd)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 6, 93(3)
Bankruptcy Rules 1969, r. 276
Insolvency Act 1967, ss. 3(2)(ii), 5(1)(a), 91(1), 93(3), 131
Insolvency Rules 2017, rr. 90(1)(b), (2), 282, 284
Rules of Court 2012, O. 3 r. 2(5), O. 20 r. 8
Rules of the High Court 1980, O. 3 r. 2(2)

For the judgment debtor/appellant - Eric Lit Siew Kee; M/s Lit & Co
For the judgment creditor/respondent - Audrey Chong Pei Ying; M/s Ling & Mok

Reported by Suhainah Wahiduddin

JUDGMENT

(Encls. 25 & 41)

Darryl Goon Siew Chye J:

[1] Enclosures 25 and 41 were two separate appeals brought by the judgment debtor against the decisions of the learned Senior Assistant Registrar.

[2] Enclosure 25 was the judgment debtor's appeal against the decision of the learned Senior Assistant Registrar delivered on 3 October 2019 dismissing the judgment debtor's application by way of his summons in

chambers of 24 May 2019 (encl. 5) with costs of RM500. Enclosure 5 was an application filed by the judgment debtor to set aside a bankruptcy notice dated 30 April 2019 ("bankruptcy notice").

[3] Enclosure 41 was the judgment debtor's appeal against the decision of the learned Senior Assistant Registrar also delivered on 24 October 2019 allowing the judgment creditor's application by way of its summons in chambers of 4 October 2019 (encl. 23) with no order as to costs. Enclosure 23 was an application filed by the judgment creditor to amend the bankruptcy notice.

[4] As both appeals were interrelated and the parties and counsel were the same, they were heard together.

Appeal In Encl. 25: Judgment Debtor's Application In Encl. 5

[5] The judgment debtor's application in encl. 5 was to set aside the bankruptcy notice on the ground of non-compliance with r. 90(1)(b) of the Insolvency Rules 2017 and that the amount of interest stated was, undisputedly overstated and in error.

[6] Rule 90(1)(b) of the Insolvency Rules 2017 states as follows:

> Issue of Notice
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> 90(1) When applying for the issue of a bankruptcy notice, the creditor shall:
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> (a) ...
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> (b) produce to the Registrar a copy of originating summons or writ of summons on which the notice is founded;
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> (c) ...
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> ...
>
> (2) If the creditor fails to comply with the requirements of this rule, the court shall reject the application.

[7] The judgment debtor contended that the word "shall" used in r. 90(1), and again in r. 90(2), was meant to be mandatory leaving no room for any discretion. Cited in support of this contention was the decision of the Court of Appeal in *Azman Jufri v. Medtronic Australasia Pty Ltd & Another Appeal* [2015] 5 CLJ 1026.

[8] The judgment debtor further contended that it was common ground that the amount of interest stipulated in the bankruptcy notice was in error. On this basis too, the bankruptcy notice ought to have been set aside. It was contended that the learned Senior Assistant Registrar was in error when she suggested that an application be filed to amend the bankruptcy notice. The judgment debtor also took issue with this on the ground that it was indicative that the learned Senior Assistant Registrar had impliedly approved of the suggested amendment.

[9] Although it was also contended by the judgment debtor that service of the bankruptcy notice was not valid because the bankruptcy notice served was not in colour, this contention was not pursued and was abandoned as a ground of appeal by learned counsel for the judgment debtor.

[10] According to the judgment creditor, during the first case management on 15 May 2019 and after realising that the writ of summons was not produced when the issue of the bankruptcy notice was applied for, directions were given for an additional affidavit to be filed and to exhibit the writ of summons and statement of claim. The additional affidavit, affirmed on 16 May 2019 with the writ of summons and the statement of claim exhibited, was filed and served on the judgment debtor who acknowledged receipt thereof on 17 May 2019. It was contended by the judgment creditor that the judgment debtor would have suffered no prejudice by reason of the breach of r. 90(1)(b) of the Insolvency Rules 2017, which could be and was, in any event, remedied.

[11] As regards the error in the amount of interest stated in the bankruptcy notice, the difference was RM684.93. This difference was due to a calculation error. The judgment creditor maintained that even if the amount of interest was in error, it does not *per se* or necessarily render the bankruptcy notice invalid citing s. 3(2)(ii) of the Insolvency Act 1967. The judgment creditor maintained that this error may be cured. Subsequently, the judgment debtor filed its application in encl. 23 to correct the error by amending the bankruptcy notice, which application was allowed and which decision became the subject matter of the appeal in encl. 41.

[12] Section 3(2)(ii) of the Insolvency Act 1967 states as follows:

> 3. (1) ...
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> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served personally to a debtor:
>
> Provided that a bankruptcy notice:
>
> (i) ...
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> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[13] The bankruptcy notice was served on the judgment debtor on Tuesday, the 14 May 2019 at approximately 2.50pm. Under the bankruptcy notice, the judgment debtor was given seven days to make payment, not including the day of service of the bankruptcy notice.

[14] According to the judgment creditor, no notice was given by the judgment debtor pursuant to s. 3(2)(ii) of the Insolvency Act 1967, within the time allowed for payment ie, seven days, to dispute the validity of the bankruptcy notice on the ground that the amount stated exceeds the amount due.

[15] Also relied on by the judgment creditor was s. 131 of the Insolvency Act 1967 which states as follows:

> **Formal defect not to invalidate proceedings**
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> 131. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[16] The judgment debtor however, maintained that the solicitors for the judgment creditor were served with an unsealed copy of encl. 5, together with the affidavit in support thereof, on the 27 May 2019 at 2.20pm. As the judgment debtor's objections and grounds therefore were stated in the said affidavit, this, the judgment debtor contended, suffices as notice of the objections taken and was in compliance with s. 3(2)(ii).

[17] Based on the fact that the bankruptcy notice was served on the judgment debtor on 14 May 2019, that Monday the 20 May 2019 was Wesak Day and a public holiday and Wednesday the 22 May 2019 was Nuzul Quran, also a public holiday. The judgment debtor contended that the seven days period to pay as stated in the bankruptcy notice expired on Monday, 27 May 2019. Therefore, the judgment debtor had until 27 May 2019 to issue the notice under s. 3(2)(ii) of the Insolvency Act 1967.

[18] It was the judgment debtor's contention that for the purposes of reckoning periods of time, O. 3 r. 2(5) of the Rules of Court 2012 applied. This was because there is no similar provision under the Insolvency Rules 2017 for the purposes of reckoning time. Accordingly, by reason of r. 284 of the Insolvency Rules 2017, such a *lacuna* would be filled by applying the Rules of Court 2012.

[19] Rule 284 of the Insolvency Rules 2017 provides as follows:

> **Rules of Court 2012 applicable in event of *lacunae***
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> 284. In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of Court 2012 shall apply, *mutatis mutandis*.

[20] Order 3 r. 2(5) of the Rules of Court 2012 provides as follows:

> 2. Reckoning periods of time (O. 3, r. 2)
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> (1) ...
>
> ...
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> (5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

[21] In support of this contention, the judgment debtor relied on the decision of the High Court in *Re Stephen Wong Leong Kiong; Ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504. In that case, an application was made to set aside the creditor's petition as the date of the act of bankruptcy therein stated was said to be in error. In computing what was said to be the correct date for the act of bankruptcy, the judgment debtor relied on the rules under O. 3 of the Rules of the High Court 1980.

[22] In *Re Stephen Wong Leong Kiong* (*supra)*, Low Hop Bing J (as His Lordship then was) held that there was no provision in the Bankruptcy Rules then applicable, that provided for the reckoning of the seven-days period contained in s. 3(1)(i) of the Bankruptcy Act 1967. As such, there was a *lacuna*. However, relying on r. 276 of the Bankruptcy Rules 1969 which was materially the same as r. 284 of the Insolvency Rules 2017, that *lacuna* was filled by O. 3 r. 2(2) of the Rules of the High Court 1980.

Appeal In Encl. 41: Judgment Creditor's Application In Encl. 23

[23] By its application in encl. 23, the judgment creditor sought to amend the amount of its claim in the bankruptcy notice from RM3,411,931.49 to RM3,411,246.56.

[24] The application in encl. 23 was made invoking ss. 91 and 93 of the Insolvency Act 1967, rr. 282 and 284 of the Insolvency Rules 2017 and also O. 20 r. 8 of the Rules of Court 2012. Section 131 of the Insolvency Act 1967 and r. 232 of the Insolvency Rules 2017 were also invoked by learned counsel for the judgment creditor.

[25] The actual sections and rules relied upon which have not been reproduced above, are set out below *seriatim* for ease of reference.

[26] Sections 91(1) of the Insolvency Act 1967 provides as follows:

> **General power of bankruptcy courts**
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> 91. (1) Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

[27] Section 93(3) of the Insolvency Act 1967 provides as follows:

Discretionary powers of the court

93. (1) ...

...

(3) The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose.

[28] Rule 282 of the Insolvency Rules 2017 provides as follows:

Effect of non-compliance with Rules

282. Non-compliance to any of these Rules or with any of practice for the time being in force shall not render any proceeding void unless the court shall direct but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.

[29] Order 20 r. 8 of the Rules of Court 2012 provides as follows:

Amendment of certain other documents (O. 20 r. 8)

8(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct.

(2) This rule does not have effect in relation to a judgment or order.

[30] It was not disputed that the amount stated in the bankruptcy notice was in error in that the amount due was overstated and in excess by RM684.93.

[31] The judgment debtor's contention was that the bankruptcy notice was not valid in the first place, because of the reasons raised by the judgment debtor in his application in encl. 5.

Appeal In Encl. 25

[32] Although r. 90(1)(b) of the Insolvency Rules 2017 appears to be couched in mandatory terms there also exists s. 131 of the Insolvency Act 1967. Section 131 makes it clear that any formal defect or irregularity would not invalidate any proceeding in bankruptcy unless otherwise ordered by the court.

[33] There is also r. 282 of the Insolvency Rules 2017 which makes it clear that non-compliance with "any of these Rules" shall not render any proceeding void unless the court directs otherwise, although it stands liable

to be set aside. Where there is non-compliance with any rule, r. 282 also provides for the proceedings to be dealt with by the court "in such manner and upon such terms as the court may think fit".

[34] The judgment debtor's contention was, in effect, that the bankruptcy notice should not have been issued due to the judgment creditor's failure to comply with r. 90(1)(b) of the Insolvency Rules 2017.

[35] In my view, the process of issuing the bankruptcy notice was part of the "proceeding" in bankruptcy. Therefore, under r. 282, even if there had been a breach of r. 90(1)(b), the court would have the power under r. 282 to deal with it "in such manner and upon such terms as the court may think fit."

[36] In this case, the learned Senior Assistant Registrar required of the judgment creditor to file a supplementary affidavit with the writ and statement of claim attached. That was done and the supplementary affidavit was also served on the judgment debtor's solicitors.

[37] To my mind, r. 90(1)(b) was not a requirement for the benefit of the judgment debtor but rather a requirement for the purposes of the court in connection with the issue of the bankruptcy notice. Therefore, the non-compliance with r. 90(1)(b) could not be said to be prejudicial to the judgment debtor, to have misled him or to have caused any injustice. A similar rationale was given in *Mat Ripen Mat Elah v. Perwira Affin Bank Bhd* [2005] 1 LNS 82; [2005] MLJU 121 and *Per: Summugam Ramasamy lwn. Ex p Kwang Keh Chong* [2018] 1 LNS 2206, although in respect of non-compliance with s. 6 of the Bankruptcy Act 1967.

[38] In *Mat Ripen Mat Elah* (*supra*), at pp. 28 to 30 (CLJ); pp. 27 to 29 (MLJ), Suriyadi J (as His Lordship then was) stated:

> Section 6 of the Bankruptcy Act reads that a creditor's petition shall be verified by an affidavit of the creditor or some person on his behalf having knowledge of the facts, and shall be served as prescribed. Unfortunately conflicting decisions abound as to whether the affidavit has to be served or not. Cases in the like of *Re Dato Othman Bokhari* [1998] 4 CLJ 315, *Re Yap Kin* [1996] 5 MLJ 355, *Re Tan Hwee Earn* [1999] 4 MLJ 248 and *Re Normah Kassim* [2002] 4 CLJ 649 have held the view that there is no legal requirement for the service of the CP, together with the verifying affidavit. As opposed to these are *Re Haroun Al-Rashid* [1996] 5 MLJ 317 and *Re Tan Ah Ba* [1999] 7 MLJ 178, ruling that since the petition was not served with the affidavit, the service thus was defective and beyond cure.
>
> *A cursory perusal of the Bankruptcy Rules will show that the purpose of the verifying affidavit is for the consumption of the Registrar only, to demonstrate to him that the contents of the CP are accurate and true (rule 108).* From this affidavit, he will also be able to decide whether the contents are more than sufficient to assist him to arrive at a decision, or a need still arises for him to summon witnesses to prove the statements in the petition. In other words it is an administrative relevancy, to act as a conduit or source of evidence for his investigation, before sealing and returning the petition for service.

By the time the CP's stage is reached, the JD would have known of the judgement, the contents and the warnings of the BN, certainly aware of the signatory, and of course will know the details of the impugned CP. With such an overwhelming amount of information already supplied to him, I see no further reason to unload on him more unnecessary details from that verifying affidavit.

That affidavit, which has the same title and distinctive number as the petition, will supply no fresh information as it is beefed up by the very same particularities found in the judgment, BN and the CP. It will thus serve no purpose for the JD, regardless of whether he has had sight of it or otherwise and needless to say, will not occasion any gain, prejudice or injustice to him. Perhaps because of that pragmatic reason Parliament has deliberately not enacted any provision requiring its service to the JD.

To wind it up it is without hesitation that I dismiss this appeal with costs.
(emphasis added)

[39] As for the amount of interest wrongly stated in the bankruptcy notice it would seem that it was held to be curable and was thus not struck out. It was suggested by the learned Senior Assistant Registrar that an application be filed to amend the bankruptcy notice.

[40] Section 3(2)(ii) of the Insolvency Act 1967 is quite clear that a bankruptcy notice "... shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due ..." unless the judgment debtor, "... within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake ...".

[41] Based on the decision in *Re Stephen Wong Leong Kiong*, notice of the judgment debtor's dispute as to the correctness of the overstated amount due was given to the judgment creditor within the time limited under s. 3(2)(ii) of the Insolvency Act 1967. Section 3(2)(ii), however, does not stipulate any prescribed form for the notice to be given. The judgment debtor's dispute, and the grounds therefore, were contained in the judgment debtor's affidavit in support of encl. 5 which was served on the judgment creditor. As a matter of fact, therefore, notice of the judgment debtor's objections was given to the judgment creditor. Such, to my mind, was sufficient notice for the purposes of s. 3(2)(ii).

[42] The decision in the case of *In Re: Azizul Nizam Bidin; Ex p Solsis (M) Sdn Bhd* [2017] 1 LNS 581; [2017] 11 MLJ 459 was relied upon by learned counsel for the judgment creditor. In that case, Mohd Nazlan Mohd Ghazali JC (as His Lordship then was) dismissed an application to set aside a bankruptcy notice upon objections, *inter alia*, that the amount stated therein was in error. In his judgment, His Lordship stated as follows:

A [41] In the instant case, no uncertainty can be said to have arisen from the understatement in the context of the bankruptcy notice. *The amount stated therein is in fact due. The understatement of the interest payable on the total amount actually due constitutes only a formal defect curable by s. 131 of the Bankruptcy Act 1967 as it is not objectively capable of misleading,* perplexing or prejudicing the JD as to what is necessary for compliance with the
B bankruptcy notice.

[42] Finally, the third ground submitted by the JD, or the second error contended to have been made by the JC in respect of the calculation of the judgment interest is that the calculation of judgment interest of 8% pa for the period of 1 January until 31 December 2012 was wrong as JC
C should have considered 365 days instead of 366 days for the said calculation.

[43] I have, however, no hesitation in holding that the complaint is *either too trivial or entirely misconceived* since the month of February for 2012 had 29 days, or an extra, leap day. *For argument sake, however, even if indeed it was*
D *an error, which it is plainly not, it would patently be a minor and mere formal defect, and one that would easily warrant the invocation of the curative provision of s. 131 of the Bankruptcy Act 1967.* (emphasis added)

[43] Learned counsel for the judgment debtor maintained, however, that the error *In Re: Azizul Nizam Bidin* (*supra*) was an understatement of the
E amount owed. The situation here, on the other hand, was an overstatement of the amount owed.

[44] In *Re Mohd Zuhri Mohd Idris*; *Ex p Bumiputra-Commerce Bank Bhd* [2010] 1 CLJ 786, the debtor's name was incorrectly stated in the bankruptcy notice. An application was made to correct the error which was allowed.
F However, on appeal, the decision allowing the amendment was set aside. Nevertheless, s. 93 of the Insolvency Act 1967 was considered a possible avenue for an amendment to be made to correct the error.

[45] However, what was significantly different in *Re Mohd Zuhri Mohd Idris* (*supra*) was the fact that the application to amend was made after the hearing
G of the creditor's petition and the adjudication and receiving orders had been made. Thus, the debtor did not have any opportunity to oppose the petition.

[46] Important to the issue at hand is the recent decision of the Federal Court in *Ambank (M) Bhd & Ors v. Lim Sue Beng* [2019] 7 CLJ 289; [2019] 4 MLJ 701. In respect of s. 93(3) of the Insolvency Act 1967, Azahar
H Mohamed FCJ (as His Lordship then was) delivering the majority decision stated:

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Section 93(3) of the BA 1967

[22] This brings us to s. 93(3) of the BA 1967, which under the legislation is the only provision that allows for any amendment to the 'written process or proceeding'. However, *the exercise of the High Court's powers under the provision is limited to clerical or minor errors that cause no prejudice to the judgment debtor.* This can be seen in the cases cited by learned counsel for the respondent.

[23] First, the case of *Amit Chhabra Ashok Kumar Chhabra v. A2k Vision Pte Ltd* [2013] 1 LNS 94 where the High Court allowed an *amendment to include the second judgment creditor's name on the bankruptcy notice as it was inadvertently omitted.* It was correctly held that the judgment debtor would not be in any way prejudiced by the amendment.

[24] The next case cited by learned counsel for the respondent is *Re Liow Fong Mooi, Ex P Malayan Banking Bhd* [2000] 6 MLJ 146; [2000] 6 CLJ 63, where there was amongst others, an *error in stating the date of the act of bankruptcy.* The High Court allowed the proposed amendment to the same. The High Court found that the *amendment was merely to correctly state the date on which the act of bankruptcy occurred and to that extent must be regarded as a technical one which did not go to the substance of the creditor's petition.*

(emphasis added)

[47] Section 93(3) of the Bankruptcy Act 1967 and s. 93(3) of the Insolvency Act 1967 are identical.

[48] Section 3(2)(ii) of the Insolvency Act 1967 provides that a bankruptcy notice "shall not be invalidated" by reason only that the sum specified in the bankruptcy notice exceeds the amount due unless notice of such objection is given by the judgment debtor within the time limited to pay.

[49] Section 3(2)(ii), however, does not state that the bankruptcy notice "shall not be invalid". If it states that a bankruptcy notice "shall not be invalid", it would imply that it shall be invalid if the required notice is given.

[50] On the other hand, the ordinary meaning of the word "invalidated" is to render ineffective (see *Collins Concise Dictionary*). Thus, the proviso in s. 3(2)(ii) would be read as providing that a bankruptcy notice is not to be rendered invalid, merely because the amount stated exceeds the amount due, unless by notice given within the time permitted, the judgment debtor disputes its validity.

[51] However, when such notice is given by the judgment debtor within the time limited, the question will then arise as to whether the bankruptcy notice should be invalidated or rendered invalid.

[52] Therefore, even if notice of an objection is properly given, whether a bankruptcy notice is to be "invalidated" (rendered invalid) or allowed to be cured by amendment pursuant to s. 93(3) of the Insolvency Act 1967, is and remains a matter of discretion for the court.

[53] In the exercise of the court's discretion, all relevant factors and the circumstances appertaining should be taken into account. Among these are whether the judgment debtor was misled, whether the error was significant and the stage of the proceeding eg, whether at the hearing of the creditor's petition or otherwise. Regard should also be had to the fact that there may be harsh penal consequences (see *Sobri Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756).

[54] In the present case, the error in the bankruptcy notice was a calculation error and the amount in error was minor; an overstated amount of only RM684.93 in relation to the total amount due of over RM3.4 million (*cf Ghazali Hj Ibrahim v. CIMB Bank Bhd* [2012] 9 MLJ 768 where the amount in error was RM932,300.90). Even if the amount in error is taken into account, the remaining amount due was still well over the statutory minimum of RM50,000 required under s. 5(1)(a) of the Insolvency Act 1967 for bankruptcy proceedings to be brought.

[55] This was an error that the judgment debtor himself was aware of. It therefore cannot be said that he was misled. It was also an error that the judgment debtor could not have been misled by, as the amount concerned was interest that was calculated over a fixed period. If the judgment debtor was concerned, he could have calculated the amount objectively and found the error, which was what presumably happened. In addition, there was no evidence that there was any attempt on the part of the judgment debtor to make payment.

[56] In the present case, the creditor's petition had not been heard. The error was such that may be cured by an amendment without any prejudice to, or injustice suffered by, the judgment debtor. Of course, if the error remained uncorrected, whether it would affect the outcome of the creditor's petition when heard is another matter.

[57] Accordingly, in the circumstances of this case, I was of the view that the bankruptcy notice should not be invalidated without the benefit of the curative provision under s. 93(3) of the Insolvency Act 1967.

[58] Having regard to the foregoing, I did not find the decision of the learned Senior Assistant Registrar to be in error.

Appeal In Encl. 41

[59] Pursuant to the judgment creditor's application in encl. 23, the amendment to the bankruptcy notice sought was granted.

[60] Although the judgment debtor contended that the bankruptcy notice was invalid and void, the bankruptcy notice had nevertheless not been set aside. The only issue then was whether the amendment to the bankruptcy notice sought by the judgment creditor could be allowed.

[61] In light of s. 93(3) of the Insolvency Act 1967, there was no reason why the amendment sought could not, or should not, be allowed having regard to the reasons given.

[62] The amount in error was quite small, relative to the total amount due. Besides, it cannot in truth be said that the judgment debtor had been prejudiced by the amendment which, in effect, reduced the sum payable by him.

[63] As for the suggestion that by asking that an application to amend be made, the learned Senior Assistant Registrar had impliedly approved of the suggested amendment, with respect, I do not think it follows. Such an inference goes too far. Practically speaking, requiring an application be made in fact, and in effect, facilitates formal objections by an opposing party whereupon the application would be heard and decided appropriately.

Conclusion

[64] For the reasons given above, both the appeals in encls. 25 and 41 were dismissed with costs.